

OFFICE OF THE STATE ATTORNEY, TENTH JUDICIAL CIRCUIT
State Attorney Jerry Hill

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October 30, 2013

via hand delivery

Sgt. Chad R. Mumbauer #67
Lakeland Police Department
Special Operations Section
219 North Massachusetts Avenue
Lakeland, FL 33801

RE: Lakeland Police Department DUI Arrest

Dear Sgt. Mumbauer:

I have reviewed your email to my office regarding the arrest of Derrick McGary and the subsequent refusal of a Lakeland Police Department officer to assist my office in complying with a judge's request for more information. On Saturday, October 26, the Lakeland Police Department arrested Derrick McGary for driving under the influence. McGary submitted to a breath test and that revealed a blood/alcohol level of .136 and .134. This was Mr. McGary's second DUI arrest in less than three years. In 2011, Mr. McGary was prosecuted by my office and convicted of driving under the influence. As you may be aware, Florida Law provides for harsher penalties for subsequent DUI's.

At his First Appearance Hearing on Sunday, October 27, the judge determined that the DUI documents submitted by Lakeland Police Department Officer Michael Kellner were insufficient to establish probable cause. Probable cause is necessary to justify holding the defendant in custody and setting a bond and other release conditions. The judge allowed the State twenty-four hours to get in contact with the Lakeland officer and obtain a probable cause statement to briefly explain the facts of the case.

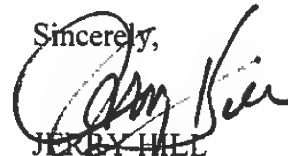
On Sunday afternoon, we emailed Officer Kellner to request that he comply with the judge's request for more information. The email, which is attached to this letter, contained an explanation of what was needed and even included the personal cell phone number for our prosecutor working that day, in case the officer had any questions. I have also enclosed a transcript from the hearing with this letter.

Instead of complying with the judge's request, Officer Kellner emailed back to tell us that the Lakeland Police Department does not, nor has ever, provided probable cause continuations. Therefore, Officer Kellner informed us that we had all we needed to establish probable cause for the arrest. Apparently Officer Kellner knows more about the law than the judge, who has been on the bench since 1999. Regardless of whether Officer Kellner thought the probable cause statement was necessary, he has no excuse for failing to comply with the judge's request. Unfortunately, and as expected, when the First Appearance Hearing of Mr. McGary was heard again on Monday, October 28, with the failure of LPD to gather the necessary documentation, the judge released Mr. McGary on his own recognizance. This means that this man, who was driving in Lakeland with a .136 b/a level, within three years of his previous DUI, was released with no restrictions on him. He did not have to post a bond, he was not ordered to abstain from drinking alcohol, he was not ordered to be monitored by the pretrial release services department. The public is at risk.

Everyone makes mistakes. Officer Kellner's actions in this case were not mistakes. His email back to my office and failure to do what the judge directed reflects an attitude. Officer Kellner responded in the way he did out of an unacceptable arrogance.

Given the comments of Chief Womack regarding the special attention to the policy and procedures relating to DUI's, I thought you would be interested in this case, which seems to indicate that there are issues of implementation. I appreciate that you followed up with my office when you became aware of this situation. Your email asks for guidance in how to handle this situation. It is simple, if a circuit judge asks for a probable cause statement, you get it to him. I hope that your agency can make that clear to Officer Kellner.

Sincerely,



JERBY HILL
State Attorney

cc: Chief Lisa Womack

Subject:

FW: DUI P.C. affidavit LPD 13-20989

From: Kellner, Michael [mailto:Michael.Kellner@lakelandgov.net]

Sent: Monday, October 28, 2013 4:24 AM

To: Kyle McNeal

Cc: Pete Mislovic

Subject: RE: DUI P.C. affidavit LPD 13-20989

The citation went with him to the Polk County Jail. We don't do nor have we ever done Probable Cause continuations unless the subject refuses or blows under .08. The subject consented to providing a breath sample and provided breath samples of .136/.134 G/210 L respectively. The breath test itself is probable cause for the arrest.

From: Kyle McNeal [mailto:kmcneal@SAO10.COM]

Sent: Sunday, October 27, 2013 3:18 PM

To: Kellner, Michael; Pete Mislovic

Subject: DUI P.C. affidavit

Officer Kellner,

This morning at first appearance hearings the only thing the judge had to establish probable cause for your DUI arrest was a citation. The judge determined that this citation, alone, was not enough to establish probable cause for the arrest. I asked for a 24 hour hold on the Defendant, which the judge granted. If you haven't done so already, would you please turn in a continuation establishing your probable cause for arresting the defendant, Derrick McGary, on the DUI charge. I have CC'd Pete Mislovic on this email because he handles the first appearance hearings during the week. If you have any questions, please feel free to email me or Pete, or call me at [REDACTED]

Thank you for your time and assistance

KYLE MCNEAL
ASSISTANT STATE ATTORNEY
10TH JUDICIAL CIRCUIT, FL



PUBLIC RECORDS NOTICE:

All e-mail sent to and received from the City of Lakeland, Florida, including e-mail addresses and content, are subject to the provisions of the Florida Public Records Law, Florida Statute Chapter 119, and may be subject to disclosure.

From: Mumbauer, Chad [<mailto:Chad.Mumbauer@lakelandgov.net>]
Sent: Monday, October 28, 2013 6:07 PM
To: Stacie Kaylor
Cc: kmneal@SAO10.com; Mumbauer, Chad; Sealey, Steven; Taylor, Richard
Subject: FW: DUI P.C. affidavit LPD 13-20989

Mrs. Kaylor,

Can you review the below string of e-mails and give me some guidance? Our agency has never been asked to provide a Probable Cause Continuation when certain criteria has been met(i.e. the arrestee consents to a breath test and the results are above an .08), the actual DUI report is completed and follows closely behind to be forwarded to the Lakeland SAO. Can you look into this instance? If you determine it's a onetime request by the judge or If your office determines we need to be completing them on every DUI arrest. I will send out an agency directive to do so, can you let me know either way? I just want to make sure we are making every effort to help you with the prosecution of the case. Thanks if you have any questions please call.

Sgt. Chad R. Mumbauer #67
Lakeland Police Department
Special Operations Section
219 North Massachusetts Avenue
Lakeland, FL 33801
(863)698-1110

From: Kellner, Michael
Sent: Monday, October 28, 2013 5:02 AM
To: Mumbauer, Chad
Subject: FW: DUI P.C. affidavit LPD 13-20989

Sgt. Mumbauer,

FYI,

We (LPD) don't do nor have we ever done Probable Cause continuations unless the subject refuses or blows under .08. The subject consented to providing a breath sample and provided breath samples of .136/.134 G/210 L respectively. The arrest is based on the SFST's and the DUI Citation is the charging document, if the breath samples provided are .08 (legal per se) or above. A separate affidavit and/or affidavit continuation are not required.

This must be a new judge? Or it's someone confusing us with PCSO. I know they have to do continuations on everything traffic or otherwise.

MAK #153

From: Kellner, Michael
Sent: Monday, October 28, 2013 4:34 AM
To: 'Kyle McNeal'
Cc: 'Pete Mislovic'
Subject: RE: DUI P.C. affidavit LPD 13-20989

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From: Kyle McNeal [<mailto:kmcneal@SAO10.COM>]
Sent: Sunday, October 27, 2013 3:18 PM
To: Kellner, Michael; Pete Mislovic
Subject: DUI P.C. affidavit

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Thank you for your time and assistance

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First Appearance Hearing, October 27, 2013, Judge: Yancey
Case: Derrick McGary ASA: Kyle Mcneal

Judge: McGary, your charged with DUI, let's see what we have here.

Judge: Well, we got an affidavit somewhere in this thing

Judge: Is there an affidavit in this at all?

Judge: Do you need me to sign this? (signing some document)

Judge: Great

Judge: Alright well counsel we don't have an affidavit on this

ASA: I don't have anything either Judge

Judge: All I got is the citation and the citation would show the BAL level but that's insufficient for probable

ASA: We would ask for 24 hours

Judge: I'll hold him over till tomorrow, we'll bring, Mr. McGary, were gonna bring you back tomorrow for, uh, we'll have the first appearance again cause I don't have an affidavit up here to tell me what's going on, which, (women speaking inaudible), oh well it's probably cause it's the Lakeland Police Department but that's alright, alright we'll bring him back over tomorrow

ASA: Can I get that name your honor?

Judge: Uh, you need the name?

ASA: Yes sir

Judge: It is State vs. Derrick McGary, McGary you want to see the paperwork then just give it to the clerk that's fine, there you go.

First Appearance Hearing, October 28, 2013, Judge: Grode
ASA: Pete Mislovic
DAT: Mr. Oertel

Case: Derrick McGary

Judge: State I have a note on this file that indicates it was to be brought back in 24 hours to file a PC affidavit

ASA: Judge, apparently this case was in first appearances yesterday uh with nothing but a uniform traffic citation showing a breath results of .136 and .134, I do not have any additional information for the court I'm of the opinion that is sufficient for probable cause however, Judge Yancey doesn't accept that opinion

Judge: Mr. Oertel do you have anything you'd like to add

DAT: I was present yesterday your honor, Judge Yancey did say that, that he didn't find that that there that was sufficient for probable cause, so that I'd ask that he be released, nothing has changed at this point.

Judge: Alright, pursuant to that understanding there will be a release ROR, good luck sir, do you have any questions for me sir, (inaudible), alright good luck sir.